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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-202

EARL HARKEY, VIRGINIA T. SUDDERTH
and FRED J. MORTON,

Petitioners,

versus

HONORABLE PETER deWETTER, as Mayor
of the City of El Paso,
DR. LEA HUTCHINSON, as Director of
Veterinary Services of the City of
El Paso, and
EARL CHOKISKI, as Chief of Police
of the City of El Paso,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JOSEPH A. CALAMIA
608 Southwest National
Bank Building
El Paso, Texas 79901

OF COUNSEL:
FRED J. MORTON
JOHN L. FASHING
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PETITION FOR A WRIT OF CERTIORARI
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The Petitioners, EARL HARKEY, VIRGINIA T. SUDDERTH, and FRED J. MORTON, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on April 12, 1971.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the appendix hereto, as well as the judgment rendered without opinion by the U. S. District Court for the Western District

of Texas.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on April 12, 1971. A timely petition for rehearing en banc was denied July 7, 1971, and this petition for certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Can a city constitutionally require homeowners to waive their Fourth Amendment rights by requiring blanket consent to warrantless searches by animal control officers and policemen as a condition to obtaining a license to keep animals on the curtilage areas of premises on which their private residences are located?

2. Can a city justify a blanket warrantless administrative search procedure on private premises without showing any real need for dispensing with a warrant, as required by the Fourth Amendment and this Court's decisions in Camara v. Municipal Court, 387 U.S. 523 (1967) and See v. Seattle, 387 U.S. 541 (1967)?

3. Can the issuance of a city license to keep animals on the curtilage areas of premises on which private residences are located be conditioned upon a waiver of the homeowners' Fourth Amendment rights, which requires blanket

consent to warrantless searches of such curtilage by animal control officers and policemen?

4. Can a City impound the animals of homeowners because of their assertion of Fourth Amendment rights in refusing to execute the City's application for a license which requires blanket consent to warrantless searches by the City?

5. Was the consent to inspection by animal control officers and policemen, obtained here from Petitioner HARKEY by threats of impoundment of his animals or prosecution for keeping animals without a permit, constitutionally valid under the principles announced by this Court in Bumper v. North Carolina, 391 U.S. 543 (1968) and Johnson v. Zerbst, 304 U.S. 458 (1938)?

STATUTORY PROVISIONS INVOLVED

I. U. S. Constitutional provisions:

A. Fourth Amendment:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

B. Section 1 of the Fourteenth Amendment:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

II. Texas Statutory provisions:

A. Article 782b, Texas Penal Code:

"Entry of private residence for health inspection; necessity of permission or authority; inadmissibility of evidence; penalties

Section 1. No officer, agent or representative of the State of Texas or any instrumentality or political subdivision thereof, or any other person, may enter a private residence for purposes of making a health inspection at any time without first receiving permission from a lawful adult occupant of such residence or being authorized to inspect that particular residence for a specific public health purpose by a magistrate or by order of a court of competent jurisdiction upon a showing of

a probable violation of the State Health Code or a law or ordinance pertaining to health of a political subdivision. Any evidence obtained in violation of the provisions of this Section shall be inadmissible as evidence in any criminal case prosecuted by the State of Texas or a political subdivision thereof.

Sec. 2. Any person violating the provisions of Section 1 of this Act shall be punished by confinement in the State penitentiary for a period not to exceed two (2) years or by a fine not to exceed One Thousand Dollars ($1,000) or by both such fine and imprisonment.

Sec. 3. If any person shall knowingly turn over any evidence obtained in violation of Section 1 of this Act to the Government of the United States or any agency or instrumentality thereof such person shall be punished by confinement in the county jail for a period not to exceed one (1) year or by a fine not to exceed Five Hundred Dollars ($500) or by both such fine and imprisonment."

III. Ordinances of the City of El Paso:

A. Section 5-1. Definitions.

"(4) Officer. Any animal warden or animal quarantine investigator employed by the department, or city policeman."

B. Sec. 5-2. Enforcement, interference with officer.

"(a) Enforcing officer. Provisions of this article shall be enforced by the director."

"(c) Interference with officer. No person shall interfere with, hinder or molest any officer in the performance of his duty. (Ord. No. 3268, § 1, 2-25-65; Ord. No. 4177, § 2, 12-19-68)"

C. Section 5-19. Penalty for violations.

"It is a misdeameanor for any person to do any act forbidden, or fail to perform any act required in this chapter and any violations are punishable as provided in section 1-6 of the El Paso City Code. (Ord. No. 3268, § 1, 2-25-65)"

D. Section 5-23. Pens and enclosures; sanitary requirements.

"(f) For the purpose of enforcing this article the director shall make inspections of all places where animals or birds are kept; and the making of an application for or the issuing of any permit under this article shall constitute consent for entry and inspection of such places by officers at all reasonable times. (Ord. No. 4117, § 5, 12-19-68)"

E. Section 5-23. Pens and

enclosures; sanitary requirements.

"(f) For the purposes of enforcing this article the director may make or cause to be made inspections of any place where animals or birds are kept; and the making of an application for, or the acceptance of, a permit under this article shall constitute consent for the director, or persons authorized to act for him, to enter and inspect, at all reasonable times and upon presentation of appropriate credentials, the premises to which such application or permit relates, except any building used as a dwelling place by human beings. (Ord. No. 4438, 7-16-70)"

F. Section 5-29. Impoundment.

"Animals or birds found to be kept in violation of provisions of this chapter, or infected with diseases, or kept under conditions which could endanger public health or create a nuisance, may be impounded by the director. Animals and birds so impounded shall be released after the reason for causing said impoundment has been corrected, or be subject to the provisions for disposition as under section 5-10 (e), Article I, of this chapter. (Ord. No. 4117, § 6, 12-19-68)"

STATEMENT OF THE CASE

This case concerns the constitutionality of El Paso City Ordinances which require homeowners to waive their Fourth Amendment rights by requiring blanket consent to warrantless searches as a condition to obtaining a license to keep animals on the curtilage areas of premises on which their private residences are located, where the City refused to limit the scope of the search or the use of its results to situations involving only violations of the animal control ordinances, which are authorized to be enforced not only by administrative personnel but also by city policemen.

Petitioners filed suit in U. S. District Court under 28 U.S.C. § 1343 (3) and the Civil Rights Act of 1871 (42 U.S.C. §1983) to enjoin enforcement of and to invalidate certain provisions of the City Code of El Paso, Texas, regulating the keeping of animals within the city limits, alleging that they were threatened with having their horses and beef calves impounded because they refused to execute (or in the case of Petitioner HARKEY had been coerced into executing) an application for a license to keep animals which states that the applicant is "familiar with the authority of the Director of Veterinary Services and his authorized representatives to inspect his premises ..." and contains a clause giving blanket "permission for officers to enter onto his property at any reasonable time for the purpose of carrying out their duties". Each of the

petitioners kept no more than two animals for pleasure or personal use on the curtilage areas (back or side yards) adjacent to their private residences, which in each case concerned one acre or more of land. The ordinance in effect at that time provided:

> "§5-23(f) - For the purpose of enforcing this article the director shall make inspections at all places where animals or birds are kept; and the making of an application for or the issuing of any permit under this article shall constitute consent for entry and inspection of such places by officers at all reasonable times."

The term "officer" is defined in §5-1 (4) to include; "Any animal warden or animal quarantine investigator employed by the department, or city policeman." (emphasis added)

In early February, 1970, Petitioner EARL HARKEY returned the application form submitted to him by the City and altered the same by deleting that wording on the form which required him to give consent to inspection by crossing over or scratching out such language therein. On February 18, HARKEY was notified that the City would not accept the application in its altered form and on February 25 advised him that his animals would be impounded if he did not sign a new application form furnished him without alteration or deletion by 11:00 a.m. that day and return it to the City. Petitioner HARKEY thereafter complied with the demand, executed the

unaltered application and returned it to the City.

Petitioner FRED J. MORTON, individually and in behalf of Petitioner, VIRGINIA T. SUDDERTH, wrote the respondent Mayor, PETER deWETTER, on January 27, 1970, refusing to apply for such permit as requested by the City unless the ordinances in question were amended so as to require actual consent from the owner of the premises to be given at the time each inspection was desired by city officials. The City refused to so amend, but insisted upon its right to require blanket consent as part of its granting a license to keep horses within the city limits under the provisions of the City Ordinances. SUDDERTH and MORTON were given until midnight, March 10, 1970, to execute the application form previously furnished them or face impoundment of their animals or prosecution for not complying with the ordinances. Section 5-19 of the chapter on Animal Control makes it a misdeameanor for any person "to do any act forbidden, or fail to perform any act required" in such chapter. Petitioners jointly filed their complaint in federal district court on the 9th day of March, 1970, against the Mayor, Director of Veterinary Services and the Chief of Police of the City of El Paso alleging that they were in compliance with the substantive requirements of the ordinances but seeking to invalidate the "required consent" provisions therein, and to vitiate the consent involuntarily obtained from HARKEY, and to enjoin impoundment of their animals on the basis that the

ordinances requiring them to waive their Fourth Amendment rights was unconstitutional. The City has since withheld further action pending decision of the courts.

Prior to judgment in the district court, the City Attorney and counsel for Petitioners corresponded concerning certain possible amendments to the ordinances in question. The City was willing to and did eventually amend the ordinances to eliminate required consent to inspect the private residence itself, changed the wording of authorized enforcement personnel in Section 5-23(f) from "officer" to "other persons authorized to act for the director of veterinary services," and to require the officer to present appropriate credentials, but "required consent" to inspection of curtilage areas remains a part of the licensing procedure. Petitioners took the position that these amendments were unsatisfactory in that they were still deprived of their right to refuse entry to city personnel purporting to act under such ordinances and to submit to warrantless searches for other possible purposes, but offered to comply if an exclusionary rule was added to the ordinances prohibiting the use of evidence discovered upon such inspections of violations of laws other than those in the Animal Code. Such offer was refused, and the ordinance was amended July 16, 1970, as indicated above, but still requiring consent to inspection of curtilage areas as a prerequisite to licensing.

The district court heard the case on the basis of an agreed pre-trial order, part of which stipulated that the areas to be inspected under the ordinances were protected by the Fourth Amendment, and entered judgment July 24, 1970, ruling that the ordinances attacked were valid, and denying all relief Petitioners prayed for. The Court of Appeals held, in short, that the ordinance in question was reasonable and that since no petitioner had ever applied for a permit, and no inspection had been asserted by the City, and no action taken by the officials to impound the animals, it could not pass on whether the ordinance would be enforced in an unconstitutional manner. See pages 5A and 6A of appendix hereto.

REASONS FOR GRANTING THE WRIT

Because compliance with the ordinances and execution of the City's application form for a license to keep animals accomplishes more than any valid court order would effect -- a lifetime search warrant, issued without a determination of even administrative type probable cause and containing no procedural safeguards such as a description of the place to be searched or of things to be seized or requiring any return to be made showing evidence found, but authorizing officers, including police, to search private residential curtilage without prior notice and to use whatever they find against the homeowner, regardless of whether it is evidence of a mere horse ordinance violation or a more serious criminal offense--the instant case raises substantial

questions concerning regulatory techniques which are designed to and have the effect of eliminating the Fourth Amendment protection against general and warrantless searches:

A. REQUIRED CONSENT TO WARRANTLESS INSPECTIONS INVALID BECAUSE WARRANT REQUIREMENT WILL NOT FRUSTRATE REGULATORY PURPOSE.

In Camara v. Municipal Court, 387 U.S. 525 (1967), and See v. Seattle, 387 U.S. 541 (1967), this Court ruled that a reasonable form of a search warrant procedure (less burdensome or technical than for criminal cases) was required to carry out administrative inspections, even in a case where the state court had found that the search was "part of a regulatory scheme which is essentially civil rather than criminal in nature, ... (and the) right of inspection ... is limited in scope and may not be exercised under unreasonable conditions"; 387 U.S. 525 at 528:

> "[A]dministrative entry, without consent, upon the portions of commercial premises which are not open to the public may only be compelled through prosecution or physical force within the framework of a warrant procedure," 387 U.S. 541 at 545. (emphasis added)

Where an official effort impairs, penalizes or infringes upon the exercise of fundamental constitutional rights, this Court has consistently held that a compelling governmental need to do so had to be shown, and further that the

governmental purpose could not be achieved by less intrusive means.

> "[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of the legislative abridgement must be viewed in light of less drastic means for achieving the same basic purpose," Shelton v. Tucker, 364 U.S. 479, 488 (1960); Aptheker v. Secretary of State, 378 U.S. 500, 508 (1964).
>
> "The governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms,"
> NAACP v. Alabama, 377 U.S. 288, 307 (1964).

See also, Zwickler v. Koota, 389 U.S. 241 (1967); NAACP v. Button, 371 U.S. 415, 438 (1963); Louisiana Ex Rel. Gremillion v. NAACP, 366 U.S. 293 (1961); Schware v. Board of Bar Examiners, 353 U.S. 232, 246 (1957); Martin v. City of Struthers, 319 U.S. 141, 146-149 (1943); Campwell v. Connecticut, 310 U.S. 296, 304-307 (1940); Schneider v. State, 308 U.S. 147, 161, 165 (1939). "Constitutional deprivations may not be justified by some remote administrative benefit to

the state," Harman v. Forssenius, 380 U.S. 528 (1965).

The most basic constitutional rule in this area is that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment -- subject only to a few specifically established and well delineated exceptions," Katz v. U.S., 389 U.S. 347, 357 (1967). The exceptions are "jealously and carefully drawn," Jones v. U.S., 357 493, 499, (1958), and there must be a "showing by those who seek exemption ... that the exigencies of the situation made that course imperative," McDonald v. U.S., 335 U.S. 451, 456 (1948). "[T]he burden is on those seeking the exemption to show the need for it," U.S. v. Jeffers, 342 U.S., 48, 51 (1951); Coolidge v. New Hampshire, _____ U.S. ____, 9 Cr. L. 3028, (No. 323, October Term, 1970, decided June 21, 1971).

The Court said in Camara, supra:

> "In assessing whether the public interest demands creation of a general exception to the Fourth Amendment's warrant requirement, the question is not whether the public interest justifies the type of search in question, but whether the authority to search should be evidenced by a warrant, which in turn depends in part upon whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search. It has nowhere been urged that fire, health, and housing

code inspection programs could not achieve their goals within the confines of a reasonable search warrant requirement," 387 U.S. at 533. (emphasis added)

In the instant case, no reason, except inconvenience of the officers and delay in preparing papers and getting before a magistrate, appears for the elimination of a warrant, and the City has offered no other reason. "But those reasons are no justification for bypassing the constitutional requirements," McDonald v. U.S., 335 U.S. 452, 455 (1948). See Johnson v. U.S., 333 U.S. 10, 15 (1948); Katz v. U.S., 389 U.S. 347, 356 (1967), and Camara and See, supra.

Health inspections carried on throughout Texas are done within the framework of a warrant procedure if consent is withheld, for Article 782b of the Texas Penal Code requires permission, a warrant or court order in such cases to make any evidence found in a private residence admissible, and the searching officer is subjected to prosecution. The difficulties which this statute cause do not appear to have endangered the general health of Texas residents or to have frustrated the purpose of Texas' health laws. There is nothing special about horses in El Paso that makes the situation any different from those in Camara and See so as to justify requiring consent to warrantless inspection as part of keeping the same on one's premises.

Surely, Petitioners' back and side yard (curtilage) areas are not less

private than Camara's apartment or See's warehouse. The City conceded the privacy in such areas were within the scope of Fourth Amendment protection and it is, whether the older "property" concepts are used, Rosencranz v. U.S., 356 F.2d 310, 313 (1st Cir. 1966); U.S. v. Davis, 423 F.2d 974, 977 (5th Cir. 1970), or the more recent formulations of Fourth Amendment scope, which speak in terms of "reasonable expectations or privacy", Mancusi v. DeForte, 392 U.S. 364, 368 (1968), under which what one legitimately seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. See Rios v. U.S., 364 U.S. 253 (1960) (taxicab); Katz v. U.S., 389 U.S. 347 (1967) (public telephone booth); and Wattenburg v. U.S., 388 F.2d 853, 857 (9th Cir. 1968) (curtilage).

All Petitioners have ever sought is to retain the right to refuse entry, or to consent if they saw fit. In most instances, this would be a mere formality. The only formality required by the City to dispense with all future formalities is execution of its application form. This is a little too informal for Petitioners! As this Court said in McDonald v. U.S., 335 U.S. 451 (1948):

> "We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was not done to shield criminals nor to make the home a safe haven for illegal

activities.. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals ... and so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative."

No such "exigencies" have been shown to exist here, and the City has thus failed to carry its burden of showing that an exception to the Fourth Amendment requirement of a warrant exists. To paraphrase James v. U.S., 432 F.2d 303, 307 (5th Cir. 1970): "In this case, there is no reason whatsoever not to get a warrant. There is simply no governmental need for quick action. Obtaining a warrant would not undercut the purpose of the search."

There is nothing in Wyman v. James, _____ U.S. _____, 27 L.Ed.2d 408 (1971), which dilutes Camara and See as authority for invalidating the ordinances in the instant case, as the Court said in reaffirming the principles of those cases pointed out: "Each concerned a true search for violations," 27 L.Ed.2d

at 418, which is the primary if not the sole purpose of the "inspections" called for here under the horse ordinances, and not any overriding governmental objective to supervise the effectiveness of dispensing public funds. No governmental largess is involved in Petitioners' private ownership of horses or beef calves.

Furthermore, Petitioners offered to go along with the required consent in the ordinance if the search and its results was to be confined to their purported limited purposes and they were entitled to such, for "The scope of search must be strictly tied to and justified by the circumstances which rendered its initiation permissible," Terry v. Ohio, 392 U.S. 1 at 19 (1968). But the City would have nothing to do with limiting the scope of the search or the use of its results, while protesting all the time that such inspections were reasonable because they were so limited.

B. REQUIRED CONSENT BY LICENSING TECHNIQUE IS AN INVALID GIMMICK.

The decision of the Court of Appeals raises important questions of abuse of the licensing power to avoid all constitutional problems on searches of activities constitutionally subject to governmental regulation in that it authorizes local, county, state and federal officials to utilize the technique to "license away" Fourth Amendment rights and thereby render the decisions of this Court in Camara and See meaningless.

In a case involving private residential curtilage on which no business is operated, product marketed, or other commercial activity engaged in, the Court of Appeals has held the City's licensing requirements to be reasonable because of language in See that "such accepted regulatory techniques as licensing programs which require inspections prior to operating a business or marketing a product" were not questioned, but would have to be resolved later! The Court of Appeals has apparently taken the language quoted from See about the use of "such accepted regulatory techniques as licensing programs" to legitimate every warrantless search scheme on premises because they are "licensed", even though conditioned upon a waiver of Fourth Amendment rights. This is a misconstruction of what was said in See, and an almost automatic reflex-like acceptance of any licensing program as constituional, which See actually said would have to be done on a case-by-case basis, if at all. The fact that premises or activities conducted thereon are subject to inspection or regulation does not remove them from Fourth Amendment protection, Mancusi v. DeForte, 392 U.S. 364 at 372, n.11 (1968), where Mr. Justice Harlan pointed out for the Court:

> "The Court's opinion in Davis v. U.S., 328 U. S. 582, does contain dicta to the effect that there is a lesser right to privacy when the government officials have a 'right' to inspect the seized items. See, e.g., id., at 593. However, the only holding in Davis was that there had been a valid con-

sent to the search; the case 'did not involve a search warrant issue'. See v. Seattle, 387 U.S. 541, 545, n.7". See also U.S. v. Kramer Gro. Co., 418 F.2d 987 (9th Cir. 1969).

In Mancusi, the Court rejected the contention that the records seized were not entitled to Fourth Amendment protection, as they belonged to the labor union (not to DeForte, the union official from whom they were seized) and were thus subject to government inspection. See also, U. S. v. Stanack Sales Co., 387 F.2d 849 (7th Cir. 1968); and U.S. v. Biswell, ____ F.2d ____ (10th Cir. 1971), in which the Court on May 18, 1971, held 18 U.S.C. §923(g) unconstitutional insofar as it authorized entry by federal treasury agents without a warrant and without the owner's permission on premises of a federally licensed firearms dealer. The opinion in Biswell was written by retired Associate Justice Tom C. Clark, even though he dissented while a member of this Court from its decisions in Camara and See. Perhaps the fears expressed in his dissent have been stilled by the fact that the Court's decisions have not proven burdensome, as most people consent and render resort to the warrant procedure unnecessary, as the majority pointed out.

Since private areas of a regulated activity cannot be subjected to inspection absent consent outside of the warrant procedure, which was conceded by the Departments of Justice and Health, Education and Welfare for the government and held by the Ninth Circuit in U.S. v. Kramer Grocery Co., supra, then warrantless inspections cannot be forced upon

the person engaging in such activity simply by means of a license conditioned upon consent to such inspection.

As this Court said through Mr. Justice Sutherland in Frost v. Railroad Commission, 271 U.S. 583 at 593-94 (1926):

> "It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result in accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny privilege altogether, may grant it upon such conditions as it sees fit to impose. The power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guarantees imbedded in the Constitution of the United States may thus be manipulated out of existence." (emphasis added)

The decision of the Court of Appeals

here is in conflict with this principle and the decision of the U. S. Court of Appeals for the District of Columbia in Standard Airlines v. C.A.B., 177 F.2d 18, 20 (1949), that, "The government cannot make a business dependent upon a permit and make an otherwise unconstitutional requirement a condition to the permit." See also, U.S. v. Hammond Milling Co., 413 F.2d 608 at 612 (5th Cir. 1969) cert. denied 396 U.S. 1002 (1970): "No warrantless search is forced upon an individual or a factory."

If the decision of the Fifth Circuit in this case is allowed to stand, it can be utilized by the U. S. Attorney General, those of the states, and general counsel for various local, state and federal departments and agencies, who have apparently overlooked this simple expedient to eliminating Fourth Amendment problems, to condition the grant of any license upon waiver of Fourth Amendment rights. Such a decision stands as a dangerous precedent against the universally accepted rule that whatever an express constitutional provision forbids government to do directly it equally forbids government to do indirectly. "Constitutional rights would be of little value if they could be ... indirectly denied," Smith v. Allwright, 321 U.S. 649, 664 (1944), or "manipulated out of existence," Gomillion v. Lightfoot, 364 U.S. 339, 345 (1960). Thus the Fourth Amendment should be held to nullify "sophisticated as well as simple minded modes" of impairing the rights guaranteed, and hit "onerous procedural requirements which effectively handicap exercise of rights"

protected, see Harman v. Forssenius, 380 U.S. 528, 541 (1965).

If the requirement of a license to keep a horse in one's backyard can reasonably and constitutionally entail waiver of Fourth Amendment rights to residential curtilage, why cannot an initial building permit for a residence be conditioned on a similar waiver of such rights in the house for building inspectors and fire marshals to thereafter and from time to time check compliance with housing, electric, health and safety codes? If so, Camara, See, Kramer Grocery Co., Hammond Milling Co., Stanack Sales Co., and the Biswell cases are all rendered meaningless by the simple use of a "license" appropriately conditioned.

As the Supreme Court of Michigan put the question in People ex rel. Attorney General v. Lansing Municipal Judge, 327 Mich. 410, 42 N.W.2d 120 (1950):

> "Under Michigan law a man may not marry a wife, operate a motor vehicle on the highways, practice law, or a number of other things, without a license from the state. May the legislature condition the granting of such licenses upon the applicant's waiver of his constitutional rights against unreasonable search of his home, marital chamber, automobile, law office, or other place where a licensed activity occurs?"

The same question and identical

issues are involved in such important regulatory legislation as that passed by the federal government controlling firearms, food and drugs, liquor, transportation, banking, agriculture and so on ad infinitum under the commerce clause. As Justice Stewart said in Coolidge v. New Hampshire, ____ U.S. _____, 9 Cr. L. 3208, (1971), "If times have changed, reducing every man's scope to do as he pleases in an urban and industrial world, the changes have made the values served by the Fourth Amendment more, not less important." This case proves his point!

Since the Court has in more recent years "discarded fictional and procedural barriers rested on property concepts", Warden v. Hayden, 387 U.S. 294 at 304 (1967), and emphasized that the Fourth Amendment protects "people not places", Katz v. U.S., 389 U.S. 347 at 351 (1967), the Court of Appeals' reliance on the legitimacy of the licensing gimmick to eliminate Fourth Amendment protections is "ill-advised", Jones v. U.S., 362 257, 266-67 (1960); Stoner v. California, 376 U.S. 483, 488 (1964).

C. THE ORDINANCES ARE DANGEROUSLY AND UNCONSTITUTIONALLY OVERLY BROAD.

Even if the scope of the search or inspection authorized by the El Paso City Ordinances was limited to violations of the Animal Control ordinances, Petitioners should not be compelled to comply with the requirements and execute the City's form or subject their animals to impoundment but the situation is even more aggravated by the fact that the

scope of the search authorized is not so limited. The fact that the definition of the term "officer" in the ordinance includes city policemen and that the ordinance, even as amended after suit, empowers "other persons authorized to act for" the Director of Veterinary Services does not exclude authority for policemen to conduct the search, and this Court has sanctioned the "cooperation" of one governmental agency with another and upheld a search for criminal evidence for which probable cause did not exist on the basis that it was incidental to a lawful administrative arrest made for civil immigration purposes which gave the right of the government to be present, Abel v. U.S., 362 U.S. 217 (1960). Thus, anyone authorized by the City's Veterinary Director to enforce the animal ordinances can obtain entry, without actual permission, but under the required consent in Section 5-23(f), and conduct a general exploratory search of the curtilage area (which is contiguous with the private residence) for evidence of other offenses, which he observes, stumbles upon or has uncorroborated anonymous tips about, seize the evidence probably planted or left there by wrongdoers and prosecute the innocent person in possession of the premises. A motion to suppress such evidence would be met with some rather devastating precedents and would probably be overruled.

Once the right of an officer to be where he could observe the evidence is established, the plain view doctrine would render it admissible, Harris v. U.S., 390 U.S. 234, 236 (1968); Kerr v.

California, 374 U.S. 23 (1963) and if an officer has a right to be on the premises here, he might look in the house hoping to obtain evidence that would give the basis for a search warrant, Compare Brock v. U.S., 223 F.2d 601 (5th Cir. 1955). The fact that the apparent purpose of the officer's original entry was more limited than it resulted in would not be fatal to use of other evidence discovered, Abel v. U.S., supra, Harris v. U.S., 331 U.S. 145 (1947); Gurlaski v. U.S., 405 F.2d 253 (5th Cir. 1968); Seymour v. U.S., 369 F.2d 825 (10th Cir. 1966). Other analogous cases are those where a simple traffic arrest or "inspection" is made, resulting in the discovery of contraband or evidence of a serious criminal offense, Creighton v. U.S., 406 F.2d 651 (D.C. Cir. 1968); Miller v. U.S., 356 F.2d 63 (5th Cir. 1966); U.S. v. Johnson, 413 F.2d 1396 (5th Cir. 1969) en banc 431 F.2d 441 (1970); U.S. v. Harflinger, 436 F.2d 928 (8th Cir. 1970).

Since no warrant is required to be issued here, Petitioners would not have the protection of the principle that the precise language of the Fourth Amendment requiring the search warrant to particularly describe 'things to be seized' forbids the seizure of one thing under a warrant describing another, Marron v. U.S., 275 U.S. 192, 196 (1927); Stanford v. Texas, 379 U.S. 476 (1965).

Petitioners offered after suit was filed to go along with the consent required by the ordinance if evidence found as a result of such an inspection was limited to prosecutions for violations of such animal control ordinances,

and excluding any evidence found of other offenses. This offer was rejected by the City out of hand.

Thus, the searches authorized by the city ordinances are as broad as those consistently condemned by the courts as "exploratory searches" or "general warrants", the use of which was a motivating factor behind the Declaration of Independence, see Berger v. New York, 388 U.S. 41, 58 (1967). The Hobson's choice to which the City wishes to subject Petitioners here -- to keep their horses or waive their Fourth Amendment rights -- is an unconstitutional alternative which it cannot impose, as it did on Harkey in coercing him into signing the application. The City can eliminate horses altogether but cannot impound Petitioners' because of their assertion of constitutional rights, see Garrity v. New Jersey, 385 U.S. 493 (1967); Spevack v. Klein, 385 U.S. 511 (1967); and Thorpe v. Housing Authority, 386 U.S. 670 (1967), where the court held a tenant could not be evicted because of assertion of First Amendment rights although she could be excluded altogether. The only choice Petitioners should be put to here is whether to consent to inspection on each occasion the officer arrives at the door. Under the Constitution, only they or a judge have the right to make the decision as to whether or not the intrusion will be allowed -- not the animal warden or policeman who wants to make it. If the City has its way, they would not be:

> "... required, before commencing the search, to present their

estimate of probable cause for detached scrutiny by a neutral magistrate. They (would) not be compelled, during the conduct of the search itself, to observe precise limits established in advance by a specific court order ... and bypassing a neutral predetermination of the scope of the search leaves individuals secure from Fourth Amendment violations only in the discretion of the police," Katz v. U.S., 389 U.S. 347 at 356, 358-59 (1967).

D. CONSENT OBTAINED FROM HARKEY IS INVALID.

Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences, Brady v. U.S., 397 U.S. 742, 748 (1970); Brookhart v. Janis, 384 U.S. 1 (1966); Adams v. U.S. Ex Rel.McCann, 317 U.S. 269 (1942); and Patton v. U.S., 281 U.S. 276, 312 (1930). Fourth Amendment rights, like all others, may be waived, Katz v. U.S., 389 U.S. 347 (1967) but the waiver of such will not lightly be inferred, Johnson v. Zerbst, 304 U.S. 458, 464 (1938), and the burden of proof, which is upon the State, Bumper v. North Carolina, 391 U.S. 543, 548 (1968), is not met by showing no more than acquiescence to a claim of lawful authority, Amos v. U.S., 255 U.S. 313 (1921); Johnson v. U.S., 333 U.S. 10 (1948). Voluntary consent must be proven by clear and positive evidence, U.S. v. Smith, 308 F.2d 657, 663 (2nd

Cir. 1962) cert. denied 372 U.S. 906 (1963). Notice of the right to refuse permission, which was not given here, has been required, Schoepflin v. U.S., 391 F.2d 390 (9th Cir. 1968), and U.S. v. Barton, 282 F.Supp. 785 (D.Mass 1967).

In the instant case, the execution of the application form by petitioner Harkey, after he had scratched out the consent provisions on the form originally submitted to him and been threatened with impoundment if he did not execute a new and unaltered form by a given time is a classic case of consent obtained by coerced means, "albeit colorfully lawful coercion" which vitiates the consent so obtained, Bumper v. North Carolina, 391 U.S. 543 at 550 (1968).

Although a procedure need not be inherently coercive in order that it be held to impose an impermissible burden upon the assertion of a constitutional right, U.S. v. Jackson, 390 U.S. 570 (1968), the regulatory scheme involved here is inherently coercive and the means used by city officials to obtain Harkey's consent were such as a matter of law, or at least such that the City has not carried its burden of establishing its "voluntariness" and "awareness". The threats to impound his animals and/or to prosecute him for keeping them without a permit, following his attempt to withhold consent, clearly establish the involuntariness of his execution of the second application form. "People do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them if

they do not come around* and (his) reaction ... was no exception to this general rule," Bantam Books v. Sullivan, 372 U.S. 58, 68 (1963).

A portion of the opinion of the Court of Appeals states:

> "As our holding here is that the questioned ordinance is reasonable, and the plaintiffs never having applied for a permit, and no inspection having been asserted by the City of El Paso on the premises involved, and no action taken by the officials to impound the plaintiffs' horses and calves, we cannot pass on whether the ordinance would be enforced in an unconstitutional manner."

This is inexplicably inaccurate both factually and legally. The facts respecting Harkey's having altered the application form and being required to execute another but unaltered one were all set out in the agreed Pre-Trial order, on which basis the case, including Harkey's plea to invalidate the second form he signed, was heard. This portion of the opinion is legally incorrect because the test is not whether an ordinance or statute would be enforced in an unconstitutional manner, but whether such legislation could be so

*Harkey could have been charged with "failing to perform any act required in this chapter", under Section 5-19 of the ordinances for refusing to execute the consent form required by the ordinances.

enforced. Petitioners' attack on the ordinance in question was for "over-breadth", in that it was alleged to authorize conduct proscribed by the Fourth Amendment. If the ordinance is overly broad in such respect, it was immaterial whether or not city officials had conducted any illegal searches or seizures under it, as long as it would have a substantial impact on Petitioners, which is undisputed in view of their keeping animals within the City limits, which rendered them subject to the ordinance. In a case involving much less direct effect upon litigants by the governmental unit attacked, Mr. Justice Marshall, in an opinion joined in by Chief Justice Warren and Mr. Justice Brennan, said in Jenkins v. McKeithen, 395 U.S. 411 at 424 (1969):

> "It is no answer that the commission has not itself tried to impose any direct sanctions on appellant; it is enough that the commission's alleged actions will have a substantial impact on him."

"It is no answer to say that the statute would not be applied in such a case," if it could be so applied. Keyishian v. Board of Regents of New York, 385 U.S. 589 at 599 (1967).

In Fourth Amendment cases, this Court has specifically held:

> "Since petitioner clearly has standing to challenge the statute, being indisputably affected by it, we need not consider either the sufficiency of the affidavit

> upon which the ... orders were based, or the standing of petitioner to attack the search and seizure made thereunder," Berger v. New York, 388 U.S. 41 at 55 (1967),

in which this Court invalidated the New York "eavesdropping" statute because it authorized conduct proscribed by the Fourth Amendment, regardless of whether or not the search was lawful. The Court said the statute violated the Fourth and Fourteenth Amendments by its blanket grant of permission to eavesdrop without adequate judicial supervision or protective procedures, which is the complaint of Petitioners here with respect to the ordinances which require a blanket grant of permission for warrantless searches without any judicial supervision or procedural safeguards.

In determining the question of whether or not a warrant is required the fact that the officers act as reasonably as they would have had they had a warrant is immaterial. In Katz v. U.S., 389 U.S. 347 at 356, this Court rejected a government argument that since the agents conducting the search did no more than they might properly have done with prior judicial sanction and a warrant that the warrantless search there should be validated. The Court said:

> "That we cannot do. It is apparent that the agents in this case acted with restraint. Yet the inescapable fact is that this restraint was imposed by the agents themselves, not by the judicial officer, they

were not required before commencing the search, to present their estimate of probable cause for detached scrutiny by a neutral magistrate. They were not compelled, during the conduct of the search itself, to observe precise limits established in advance by a specific court order. Nor were they directed, after the search had been completed, to notify the authorizing magistrate in detail of all that had been seized. In the absence of such safeguards, this Court has never sustained a search upon the sole ground that officers (acted) reasonably ... and voluntarily confined their activities to the least intrusive means consistent with that end. Searches conducted without warrants have been held unlawful notwithstanding facts unquestionably showing probable cause, for the Constitution requires 'that the deliberate, impartial judgment of the judicial officer ... be interposed between the citizen and the police' ..." (emphasis added)

Thus, the probable or past reasonableness of the officers in carrying out these inspections under the horse ordinances is immaterial and is no answer to the fact that the ordinance authorizes conduct of a series of searches without the owner's voluntary consent, which are not pursuant to a warrant or court order which specifies their scope, or which provides any limitations or other protective procedures.

The far reaching effect of the Fifth Circuit's decision in this case cannot be minimized by the bland assertion that it only involves the ordinances in question here, because identical issues are involved in most if not all of the many areas of our lives which are subject to governmental regulations at the local, state and federal levels. Mr. Justice Bradley's admonition in his opinion for the Court almost a century ago in Boyd v. U.S., 116 U.S. 616, 635 (1886), is worth repeating here:

> "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of the Courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."

Provisions such as those in El Paso's ordinances, requiring blanket consent to inspections as a condition to a license

to keep animals on residential curtilage, have been proven by Camara and See to be unnecessary, by history and experience to be dangerous, and oppressive, but by the Fifth Circuit to be reasonable and constitutional, a situation which now only this Court can correct.

Even the exclusionary rule, which Petitioners offered as a compromise device to afford them some but an unsatisfactory means of protection, is an inadequate and recently criticized implementation of Fourth Amendment rights. As the Fourth Circuit said in an en banc decision issuing an injunction against searches on uncorroborated anonymous tips:

> "Unless equity Courts find means to protect the innocent homeowners, who are the principal beneficiaries of the Fourth Amendment, their rights will not be protected. It would be a grotesque irony if our courts protect only against the unlawful search which actually uncovers contraband (by the exclusionary rule), while offering no relief against an ... unlawful pattern and practice affecting hundreds of innocent homeowners," Lankford v. Gelston, 364 F.2d 197 (1966).

CONCLUSION

For the reasons stated above, it is respectfully submitted that the questions presented are substantial and that they are of public importance, because of which the writ of certiorari should be

granted, and the judgment Court of Appeals be reversed and rendered in favor of Petitioners.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Joseph A. Calamia, Attorney for Petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that I served three copies of the foregoing Petition for Writ of Certiorari on Respondents by mailing three copies thereof in a duly addressed envelope with first class postage pre-paid to Mr. Travis White, City Attorney, City-County Building, El Paso, Texas. On the 2nd day of August, 1971.

Joseph A. Calamia

JOSEPH A. CALAMIA
608 Southwest National
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APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION.

EARL HARKEY, et al.,	)	
	)	
VS.	)	EP-70-CA-37
	)	
HONORABLE PETER deWETTER, as Mayor of the City of El Paso, et al.	)	Filed July 24, 1970

Came on to be heard the above cause, and the parties having submitted said case to the Court on the merits by stipulations, and the Court having heard the arguments of counsel and having taken said case under consideration is of the opinion and finds that the Court has jurisdiction to hear said cause, that the ordinance in question is valid, that the Plaintiffs are not entitled to any relief as prayed for.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that Plaintiffs' petition for an injunction be, and hereby is DENIED and that the Defendants do have and recover their costs of suit for which execution shall issue.

ENTERED THIS 24th day of July, 1970.

/s/ Ernest Guinn
UNITED STATES
DISTRICT JUDGE

APPENDIX "B"

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 30503

EARL HARKEY, ET AL.,
Plaintiffs-Appellants,

versus

HONORABLE PETER deWETTER, as Mayor of the City of El Paso, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of Texas

(April 12, 1971)

Before MORGAN and CLARK, Circuit Judges, and SKELTON,* Judge of the U. S. Court of Claims.

PER CURIAM: Plaintiffs Earl Harkey, Fred J. Morton, and Virginia T. Sudderth filed an action against Peter de Wetter, as Mayor, Dr. Lea Hutchinson, as Director of Veterinary Services, and Earl Chokiski, as Chief of Police, all officials of the City of

*Honorable Byron G. Skelton, sitting by designation.

El Paso, Texas, seeking to invalidate an ordinance of the City of El Paso and enjoin enforcement thereof, alleging that such ordinance deprived the plaintiffs of their rights, privileges, and immunities secured by the Fourth and Fourteenth Amendments to the United States Constitution. They assert jurisdiction under 28 U.S.C. 1343, 2201 and 2202, and 42 U.S.C. 1983.

The parties below submitted the case to the district court on the merits by stipulation, and the court below rendered an order finding "that the court has jurisdiction to hear said cause, that the ordinance in question is valid, that the plaintiffs are not entitled to any relief prayed for".

Each of the plaintiffs resides on tracts of one acre or more within the city limits of the City of El Paso, Texas, and keeps animals (horses and beef calves) on the premises on which their private residences are located; and they allege that if they fail to obtain a permit under certain ordinance provisions of the City of El Paso, they are threatened with impoundment of their animals and thereby will suffer irreparable damage.

In substance, the ordinance in question regulates occupants of residences who maintain horses, calves, and other animals on their premises by requiring removal of manure and other droppings from the pens, stables, and other enclosures twice weekly, and further regulates watering tanks and troughs by requiring that such be adequately drained to avoid overflows so as to prevent the breeding of flies, mosquitoes,

and other insects. The plaintiffs object to the inspection provision of the ordinance that provides:

Chapter 5, Article II — El Paso City Code
Sec. 5-23 Pens and enclosures; sanitary requirements.

* * * *

> (f) For the purposes of enforcing this article the director may make or cause to be made inspections of any place where animals or birds are kept; and the making of an application for, or the acceptance of, a permit under this article shall constitute consent for the director, or persons authorized to act for him, to enter and inspect, at all reasonable times and upon presentation of appropriate credentials, the premises to which such application or permit relates, except any building used as a dwelling place by human beings.

Appellants allege that the ordinance provision authorizes warrantless searches of their premises and that such ordinance is unconstitutional on its face in that the law and permit required thereunder seeks to coerce the consent to searches and seizures upon private property without a warrant, and that the conditioning of a permit to keep animals in the city limits upon consent to such searches is an unconstitutional condition and need not be complied with in order to keep animals in the City of El Paso.

The main thrust of plaintiff's argument that the

questioned ordinance is unconstitutional in that it violates the teachings of *Camara* v. *Municipal Court*, 387 U.S. 523 (1967), 18 L.Ed. 2d 930, 87 S.Ct. 1727; and *See* v. *Seattle*, 387 U.S. 541 (1967), 18 L.Ed. 2d 943, 87 S.Ct. 1737. We find *Camara* inapposite as Camara was awaiting trial on a criminal charge for refusing to permit building inspectors to inspect his *residence* without a warrant. In *See* appellant was seeking reversal of his conviction for refusing to permit the building inspector to inspect his *locked commercial warehouse* without a warrant and without probable cause to believe there was a violation of the municipal fire code. Justice White, writing for the majority in *See*, stated:

> "We do not in any way imply that business premises may not reasonably be inspected in many more situations than private homes, nor do we question such accepted regulatory techniques as licensing programs which require inspections prior to operating a business or marketing a product. Any constitutional challenge to such programs can only be resolved, as many have been in the past, on a case-by-case basis under the general Fourth Amendment standard of reasonableness."

We hold that the ordinance here in question is reasonable.

As our holding here is that the questioned ordinance is reasonable, and the plaintiffs never having applied for a permit, and no inspection having been asserted by the City of El Paso on the premises involved,

and no action taken by the officials to impound the plaintiffs' horses and calves, we cannot pass on whether the ordinance would be enforced in an unconstitutional manner.

The judgment of the district court is

AFFIRMED.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

APPENDIX "C"

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 30503

EARL HARKEY, ET AL.,
Plaintiffs-Appellants,

versus

HONORABLE PETER deWETTER, as Mayor of the City of El Paso, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of Texas

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion Apr. 12, 1971, 5 Cir., 1971, ____ F.2d ____)

(July 7, 1971)

Before SKELTON,* Judge, and MORGAN and CLARK, Circuit Judges.

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*Honorable Byron G. Skelton, U. S. Court of Claims, sitting by designation.

HARKEY, ET AL. v. HON. deWETTER, ET AL.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

APPENDIX "D"

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1970

No. 30503

Docket No. EP-70-CA-37

EARL HARKEY, ET AL.,

Plaintiffs-Appellants,

versus

HONORABLE PETER deWETTER, as Mayor of the City of El Paso, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Western District of Texas

Before MORGAN and CLARK, Circuit Judges, and SKELTON*, Judge of the U. S. Court of Claims.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

It is further ordered that plaintiffs-appellants pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

April 12, 1971

Issued as Mandate: Jul 15, 1971

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*Honorable Byron G. Skelton, setting by designation.